BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: May 9, 2001
Case Nos: 2001-INA-00002
In the Matter of:

EAGLE PASS ISD
On Behalf of:

FREDERIC TEJADA
Alien

Appearance: William J. Munter, Esq.

Certifying Officer: John W. Bartlett
Dallas, Texas

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Frederick Cahatol Tejada ("Alien") filed by Employer, Eagle Pass Independent School District ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, Dallas, Texas denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have

been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On August 17, 1999, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Classroom teacher in its Public School District, which was given the Occupational Title of Teacher, Secondary School.

The duties of the job offered were described as follows:

> Teach mathematics at the secondary or middle school level. Provide students with appropriate learning activities and experience designed to help them fulfill their potential For intellectual, emotional, physical, and social growth. Enable students to develop competencies and skills to function successfully in society.

A Bachelors Degree in any field was required, but no experience was needed. Wages were $37,761.21 for 9 ½ months. No employees were supervised and the employee would report to the Campus Principal. Special requirements were: "Must have or be eligible for a Texas Certificate or Alternative Teacher Certification Program; Certified as a teacher in another state or be eligible for permit as necessary."(AF-56-87)

On February 29, 2000, the CO issued a NOF proposing to deny certification. The CO found that Employer had not provided proof of advertising for the job offer. The CO, also, found Employer in violation of 20 C.F.R. 656.21(b)(6) in that four U.S. applicants were referred for employment but results incomplete. The CO stated: "The employer failed to provide written proof that applicants An Malefakis and Rod Driscoll were actually contacted. In addition, Cristina Almendarez appears qualified for the job opportunity. However, the employer failed to provide documentation as to why Ms. Almendarez failed to meet the actual minimum requirements for the job opportunity. Instead the employer stated she was sent for interviews to other campuses, but failed to provide the final outcome. Finally, Elizabeth Buretta was rejected for not having 24 hours of math courses. The ETA 750, Part A does not state that a U.S. worker must possess a

certain number of hours in math...” Specific documentation to support the lawful rejection of the named U.S. applicants was required as corrective action. (AF-30-33)

Employer, in its rebuttal dated March 10, 2000, stated that advertising proof had been submitted, but further forwarded a tear sheet. With respect to applicants Malefakis and Driscoll, Employer stated that neither applicant replied to certified mail nor had a phone number. Applicant Almendarez was currently employed by Employer. Applicant Buretta was kept in contact; the applicant still only had 18 hours of mathematics work completed. Employer stated: “Attached please find copies of pages from the Texas Teacher Certification Handbook Section XVII Permits. Page 4, under 230.504 Specific Requirements for Initial Emergency Permits (c) Assignments to secondary grades (regular students), specifically indicates they must have 24 hours in the subject to be taught. I would like to mention that Mr. Tejada’s application was the second application submitted to you from this district. When we submitted the first application on another employee, we included the stipulation of 24 hours and were told by the Texas Work Force Commission to remove it because it was too restrictive.”(AF-8-29)

On June 5, 2000, the CO issued a Final Determination, denying labor certification. The CO found that Employer had documented proof of advertising, and accepted Employer’s contentions with respect to applicants Malefakis, Driscoll and Buretta. The sole basis for denial was stated as follows by the CO: “The employer stated that Cristina Almendarez is currently employed with us at the Eagle Pass High School teaching mathematics. Since the employer only recruited for only one position and it has been filled by a U.S. worker, there is no longer a job opening. Therefore, since the job opportunity has been filled this application is denied.” (AF–5-7)

Employer’s motion for reconsideration dated July 7, 2000 was denied on September 7, 2000. Employer appealed, November 15, 2000 (AF-1-3)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp.,1988-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 1992-INA-321 (Aug. 4, 1993). Where the CO reasonably requests specific information to aid in the determination of whether certification should be granted, the employer must

provide it. Landscape Service Corporation, 1996-INA-085(Jan. 26, 1998). Although this Board will not usually consider arguments made on appeal, the CO should reconsider his or her decision where a motion is grounded in allegations of oversight, omission or inadvertence by the CO which, if credible, would cast doubt upon the correctness of the FD, and the employer had no previous opportunity to argue its position. Harry Tancredi, 1988-INA-441 (Dec. 1, 1988) (en banc).

Employer during the process of its application often mentioned the shortages of teachers in their school district at the secondary level, as well as the high turnover which approximated 75 per year. In its motion for reconsideration Employer stated specifically: "..we had more than one vacancy for mathematics teachers when these applications were submitted therefore all applicants were sent to both Eagle Pass High School and Memorial Jr. High School." Employer proceeded to cite Texas law that required that the principal must make the recommendation for appointment of teachers and Ms. Almendarez was chosen by the principal at Eagle Pass (as, presumably, opposed to Memorial Jr. High). Employer further pointed out that at the current time it had four teaching vacancies for mathematics in these two schools which they have been unsuccessful in filling. (Letter of November 15, 2000, not given an AF page number).

The CO's reason for denying certification based entirely on applicant Almendarez is not supported in the record as proper since it denied Employer the opportunity to document the time at which it had hired her. For example, had she already been an employee of Employer prior to the application (but wanting, for example, to find a different school) the job would not have been "filled" as the CO found. On the other hand, had Ms. Almendarez been hired for a "new" job opening, as Employer seems to indicate is the situation here, the one for which alien had applied would not necessarily be the one "filled" by her. We believe that the CO should have given Employer this opportunity during the application process itself, or at least permitted reconsideration and issuance of a new NOF, if appropriate based on Employer's explanation. The fact that Ms. Almendarez was hired at some time is a further indication of Employer's good faith in recruitment efforts.

Under the circumstances we believe the best course is remand. The high turnover rate and apparent continuing need for new applicants by Employer, as well as disbursed hiring procedures and involvement of Texas law and regulations, may require closer communications between the CO and Employer in any future applications.

ORDER

The Certifying Officer's denial of labor certification is VACATED and this matter remanded for appropriate action.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge